No. 83-2140

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1984

MURRAY CITY, SCOTT ROBINSON, GARY REID and JOHN DOES 1 through 20, Petitioners.

vs.

CRAIG K. MISMASH.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals properly refuse to apply a Utah statute of limitations specifically governing assault, battery and false arrest to a § 1983 action which alleged assault, battery and false arrest?

2. Does the characterization of all § 1983 actions as involving "injuries to the rights of another" justify the rejection of a state statute of limitations governing the precise factual claims asserted by the plaintiff?

3. Does the "complex" and "constitutional" nature of § 1983 actions justify wholesale disregard of every factually analogous state statute of limitation?

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra.) is reported at 730 F.2d 1366 (10th Cir. 1984). That opinion relies on a companion case, Garcia v.

Wilson, 731 F.2d 640 (10th Cir. 1984), reproduced at App. B, infra. The opinion of the District Court of Utah (App. C. infra.) is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 30, 1984. The jurisdiction of this Court is now sought pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Pertinent portions of 42 U.S.C. § 1983 and 42 U.S.C. § 1988 are set forth in Appendix D., infra. The applicable Utah statutes of limitations are set forth in Appendix E, infra.

STATEMENT

Plaintiff-Respondent brought suit in U.S. District Court for the District of

Utah under 42 U.S.C. § 1983 charging defendant Murray City and two of its policemen with assault, battery and false arrest. The district court dismissed because the lawsuit was not timely filed within one year, as required by Utah's statute of limitation governing claims for assault, battery and false arrest. Utah Code Ann. § 78-12-29(4) (1953).

The Tenth Circuit reversed, holding that the statute of limitations governing assault, battery, and false arrest was not an appropriately analogous statute of limitations to be applied to this or any other action brought pursuant to § 1983. Characterizing all § 1983 actions as involving "injuries to the rights of another," Mismash v. Murray City, 730 F.2d 1366, 1377 (1984),

and finding no Utah statute specifically limiting actions of that precise nature, the court applied instead the four-year "catch all" residual statute for actions "not otherwise provided for by law," Utah Code Ann. § 78-12-25(2) (1953), and remanded to the district court.

REASONS FOR GRANTING THE PETITION

No federal statute of limitations exists for § 1983 civil rights claims. Congress, however, has directed the federal courts to apply state law when federal law is silent and the state law is not inconsistent with the Constitution or federal statute. See 42 U.S.C. § 1988 (1981) at App. D. As this Court has observed, federal courts selecting a state statute of limitations must apply "the most appropriate one provided by state law" governing "an analogous cause

of action." Board of Regents v. Tomanio, 446 U.S. 478, 483-484, 485 (1980). It has also explained that:

> [w]hen Congress has provided no statute of limitations for a substantive claim which is created, this court has nonetheless borrowed what it considered to be the most analogous state statute of limitation to bar tardily commenced proceedings.

Id. at 488 (emphasis added).

To properly identify, select and apply the most analogous state statute of limitations, a federal court must first examine the underlying nature of the civil rights claim and compare it with the available state provisions. In this case the plaintiff made obvious allegations of assault, battery and false arrest by claiming that he was falsely arrested and physically abused by the defendant police officers. The

district court, consistent with this Court's instructions in Board of Regents v. Tomanio, supra, selected the most obviously applicable and analogous state statute of limitation, Utah Code Ann. § 78-12-29(4), (App. E, infra), which specifically governs claims for assault, battery, and false arrest.

The Tenth Circuit, however, disregarded the underlying facts of this case and, restyling all § 1983 actions as "injuries to the rights of another," thus decided that the wrong statutory period had been applied.

I. THE TENTH CIRCUIT ERRONEOUSLY AVOIDS APPLICATION OF THE "ANALOGOUS STATE CLAIM" FORMULA BY REDEFINING ALL § 1983 ACTIONS WITHOUT ANY CONSIDERATION OF THE FACTUAL NATURE OF THE UNDERLYING CLAIM.

The procedure heretofore followed by the Tenth Circuit has been to examine

the § 1983 claim for its underlying facts and to select an analogous state statute of limitations. See, e.g., Clulow v. Oklahoma, 700 F.2d 1291, 1299 (10th Cir. 1983). Other circuits have used the same method. See, Aitchison v. Roffiani, 708 F.2d 96 (3d Cir. 1983); Morrell v. City of Picayune, 690 F.2d 469 (5th Cir. 1982); McGhee v. Ogburn, 707 F.2d 1312 (11th Cir. 1983); McClam v. Barry, 697 F.2d 366 (D.C. Cir. 1983). In McClam v. Barry, the D.C. Circuit, at the hand of Judge Bork explained,

> In determining what claim (among those for which a state limitation period is specified) is most closely analogous to a given federal claim, the court should select the claim most closely comparable to the federal with respect to fact finding accuracy and settled expectations. The comparison of any two claims will generally focus on the facts that

must be litigated in trying them.

697 F.2d at 374. (Emphasis added)

The district court in this case properly chose the most analogous statute, consistent with the previous instructions of this Court. Nevertheless, and despite the existence of a statute governing the precise claim asserted, the Tenth Circuit reversed. After re-styling the plaintiff's § 1983 action as one arising from "injuries to rights," the court held that it was not similar to those actions governed by any Utah statute of limitations, and applied the four-year residual, "catch all", statute.

In Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984), decided contemporaneously with this case, the Tenth Circuit offered the following reasons for its

departure from the directions of the Supreme Court.

First, a need for uniformity: Due to the "varied factual circumstances producing civil rights violations and the diversity of state limitations statutes", the court found it "not surprising that no uniform approach to this problem has developed." Id. at 643. Believing that "the Supreme Court has been singularly unhelpful in providing guidance" and failed "to come to grips with the problem" the en banc panel felt it "imperative that [it] establish a consistent and uniform framework by which suitable statutes of limitation can be determined for all section 1983 claims in this circuit." Id.

Second, the complex and constitutional nature of a § 1983 claim: The appellate court decided to meet the need for uniformity by "adopt[ing] a general characterization for all civil rights claims based on [its] perception of the nature of such claims . . ." Id. at 649. The perception it offered is that "the facts establishing a constitutional or statutory deprivation frequently are complex and peculiarly within the knowledge of the defendant," and that the "evidence necessary to support a section 1983 claim is so often significantly distinct from the facts at issue in an arguably analogous state cause of action that the differences cannot be dismissed as unimportant." Id. The court then held that "every section 1983 claim is in essence an action for injury to

personal rights," Id. at 651, and that the underlying factual basis for the claim need not be considered in determining the applicability of a state statute of limitations.

Third, the difficulty in choosing an analogous state statute: The Tenth Circuit opined that "virtually any § 1983 claim is arguably analogous to more than one state cause of action," id. at 650, and that choosing an analogous statute therefore "is an uncertain task with no definitive answer." Id. Thus, it concluded, the parties are encouraged to "argue the state factual analogy favorable to their respective positions at every stage of the proceedings with a justifiable hope of success," which "encourages voluminous litigation." Id.

Petitioners suggest that each of these offered justifications are unsound and the result antithetic to the prior directions of this Court.

A. An Argument for Uniformity Alone Is Not a Valid Justification for Rejecting a Factually Analogous State Statute of Limitation.

This Court has rejected uniformity as the paramount goal of civil rights enforcement:

> Whatever the value of nationwide uniformity in areas of civil rights enforcement where congress has not spoken, in the areas to which section 1988 is applicable, congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. The statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues.

Robertson v. Wegmann, 436 U.S. 584, 594 (1978). In Board of Regents v. Tomanio,

supra, the Court forbade federal courts from disregarding applicable state statutes merely for the sake of uniformity:

> Uniformity has also been cited as a federal policy which sometimes necessitates the displacement of an otherwise applicable rule of law. A need for uniformity, while paramount under some federal statutory schemes, has not been held to warrant the displacement of state statute of limitations for civil rights actions. . . .

446 U.S. at 489.

In this case the district court, on the basis of the claims asserted by the plaintiff, applied the limitations period applicable to claims of assault, battery and false arrest and found the action untimely. The choice was plain, yet the court of appeals improperly disregarded the precise applicable statute in order to establish a "uniform framework" for statute selection in

§ 1983 actions. Such action falls outside proper judicial function and breaks sharply with the previous guidelines set by this Court.

B. The Claimed Complex and Constitutional Nature of a § 1983 Action Does Not Justify Rejection of an Analogous State Statute of Limitation.

A § 1983 case has a "constitutional nature," the Tenth Circuit held, which distinguishes it from all others and requires rejection of all factually analogous state statutes. It held that the federal claim is different because the "evidence necessary to support a § 1983 claim is so often significantly distinct . . ." Garcia v. Wilson, 731 F.2d at 649. Because the § 1983 plaintiff must "prove action under color of state law," but "need not prove such

facts to recover in a state law action" the court of appeals determined that state limitation periods are not necessarily appropriate in civil rights cases. The logic of such reasoning is arguably suspect; nevertheless, such a wholesale rejection of analogous state provisions merely because the plaintiff needs to prove that the individual defendants were agents of the city is not only tantamount to judicial legislation, but is contrary to the decisions of this Court.

Johnson v. Railway Express Agency, 421 U.S. 454, 464 (1975) emphasized that there is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law." Further, in Board of Regents v. Tomanio, 446 U.S. at 488, the Court

explained that using analogous state limitations periods is not inconsistent with either of the two "principal policies in § 1983, . . . deterrence and compensation." It has also stated that "a state statute cannot be considered inconsistent with federal law merely because the statute causes the plaintiff to lose the litigation." Id. at 488.

In McClam v. Barry, 697 F.2d at 373, the D.C. Circuit accurately summarized the Supreme Court's position as follows: "The Supreme Court did not intend the constitutional character of a cause of action by itself to be a ground for rejecting as not closely analogous an otherwise identical common law action." This conclusion is also supported by the holding of Maine v. Thiboutot, 448 U.S. 1, 5 (1980) that the § 1983 remedy

"broadly encompasses violations of federal statutory as well as constitutional law." The Tenth Circuit's failure to recognize the statutory basis of potential claims under § 1983 detracts from the logic of characterizing all § 1983 actions as "constitutional" in order to reject factually analogous state statutues.

The Tenth Circuit further holds that proving color of law is so "complex" that factually analogous state statutes are never really similar. While this argument may have some limited basis in theory, as a practical matter most federal courts seem able, without undue difficulty, to deal with the factual and legal issues attendant to the question of "state action."

In the McClam opinion Judge Bork emphasized that proving color of law is not usually a difficult obstacle:

> [T]hat the defendant's action was done in his official capacity must be proved in a constitutional case, but the issue will usually be so simple a factual (as opposed to legal) matter that it will be insignificant for purposes of comparing claims in the respects relevant under Johnson and Tomanio.

McClam v. Barry, 647 F.2d at 374, n. 7 (1983).

Even if occasional complexity on the color-of-law issue exists, there is none here as the defendant officers were admittedly on duty when the incident occurred. The "complex" factual issues of concern to the Tenth Circuit were quickly disposed of with but ten questions eliciting the necessary admissions

from the defendant officers at their depositions. (Appendix F, infra.)

Simply put, the "color of law" argument offers no logical foundation for the Tenth Circuit's decision.[1]

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[1]The Tenth Circuit in Garcia, specifically rejected the reasoning of McClam, in part because it disagreed with McClam's assumption that the facts necessary to prove state action were relatively easy to prove, and because some statutes of limitations were not necessarily concerned primarily with fact finding certainty and settled expectations, i.e., those specifically applicable to state officials, or purporting to govern § 1983 actions. However, in the instant case, neither reason is valid, as the facts necessary to prove state action were easy to prove, and the statute was not specifically directed to state actors or § 1983 actions.

C. Mere Difficulty in Choosing the Appropriate Statute Does Not Justify the Disregard of an Analogous State Statute Governing the Precise Claim Asserted.

The court of appeals rejected Utah's limitations period for claims of assault, battery and false arrest because of the possibility that § 1983 claims may be "arguably analogous to more than one state cause of action." Garcia v. Wilson, 731 F.2d at 650. The resulting uncertainty, it is said, leads to voluminous litigation because opposing counsel may argue for application of different statutes. Even if such factual predicate is true, the court's reasoning seems to transform the adversary system, usually considered an asset, into a perceived liability. While one may sympathize with the

difficulties inherent in choosing the proper statute of limitations, the responsibility remains to adhere to the formulas established by the Supreme Court in making that choice. The solution fashioned by the court of appeals not only ignores the language of § 1988 and the relevant instructions of this Court, but it has the off-handed practical effect of abrogating every factually analogous statute of limitations in Utah.

In Board of Regents v. Tomanio, 446 U.S. at 483, this Court directed the federal courts to "apply the analogous New York statute of limitations corresponding to [the plaintiff's] constitutional claims. . ." This instruction logically presupposes that all available state statutes will be reviewed in the attempt to discover a correspondingly

analogous statute. In contrast, the Tenth Circuit's approach was simply to ignore any Utah statute not containing the incantation, "injury to the rights of another."

D. The Decision Below Disregards the Public Policy Considerations Justifying the Application of a Relevant Statute of Limitations.

The court of appeals failed to recognize that there are legitimate reasons for the application of statutes of limitations. "Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system," Board of Regents v. Tomanio, 446 U.S. at 487. After a cause of action accrues, "there comes a point at which delay of a

plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the factfinding process or upset settled expectations that a substantive claim will be barred without regard to whether it is meritorious" Id.

Federal courts are obligated to adopt the state statute because "when federal law has not spoken, the state statute is the only law available that reflects the appropriate judgment about factfinding accuracy and settled expectations." McClam v. Barry, 697 at 374.

Utah's legislature has determined that actions for assault, battery and false imprisonment are to be brought within one year. The imposition of a four-year statute thus supercedes and repeals Utah's "appropriate judgment about factfinding accuracy and settled

expectations." Indeed, the decision to apply a four-year statute of limitations for assault, battery and false arrest is not only contrary to Utah's "appropriate judgment" on the subject, but conflicts with the legislative judgment of forty-six other states and the District of Columbia, all of which have statutes of limitations for similar claims of one, two, or three years. See Appendix G.

E. The Rejected Utah Statute Is Not Inconsistent with the Constitution or Laws of the United States.

The Supreme Court has held that "§ 1988 authorizes federal courts to disregard an otherwise applicable state rule of law only if the state law is inconsistent with the Constitution and laws of the United States." Board of Regents v. Tomanio, 446 U.S. at 485

(emphasis added). There was no valid claim that Utah's assault, battery and false arrest statute is inconsistent with federal law or the Constitution.[2] Absent that argument or such conclusion by the court, the court of appeals simply had no sound basis for ignoring Utah's factually precise and analogous statute.

II. THE DECISION BELOW RESULTS IN INCONSISTENCY, UNCERTAINTY, AND FUNDAMENTAL UNFAIRNESS TO DEFENDANTS.

While the Tenth Circuit asserts that it has thus achieved its goal of uniformity, in fact the practical result is one of inconsistency and continuing uncertainty. The one year statute remains

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[2]Indeed, this Court has had occasion to apply statutes of similar length, with no apparent disapproval. See, e.g., Chardon v. Fernandez, 454 U.S. 6 (1981).

effective in assault, battery and false arrest cases in state court, and presumably in diversity cases asserting similar claims in federal court. On the other hand, only the four year "catch all" statute applies to a § 1983 action (regardless of the factual basis therefor) in federal court. It remains unclear, however, which statute now applies to a § 1983 action, filed in state court,[3] as the Tenth Circuit held only that "section 1983 claims brought in federal court in Utah are subject to the four-year limitation period. . . ." Mismash v. Murray City, 730 F.2d at 1367 (emphasis added).

Thus, whether the one year or the four year statute applies is now

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[3]As authorized by Martinez v. California, 444 U.S. 277 (1980).

dependent upon: (1) whether the action is pending in state or federal court; (2) whether the tortfeasor was acting under color of law; and, (3) whether the severity of the incident rises to the level of a "constitutional claim."[4] Therefore, opposing parties will still argue for the application of different statutes, as the application of the one or four year statute may depend, as a practical matter, upon whether the plaintiff's nose was merely grazed once, or several times, or broken; whether the

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[4]The lower courts' broad characterization of all § 1983 cases as "constitutional" also ignores the fact that not every false arrest, assault and battery necessarily results in a deprivation of constitutional rights. See generally: Paul v. Davis, 424 U.S. 693 (1976); Parratt v. Taylor, 451 U.S. 527 1981, Baker v. McCollan, 443 U.S. 137 (1979), Wells v. Ward, 470 F.2d 1185 (10th Cir. 1972).

fist inflicting the injury was that of a policeman or a private person; and whether the lawsuit was filed in State or Federal court.

Difficulties may also be anticipated in cases where a pendent state claim for assault, battery and false arrest is asserted along with a § 1983 claim based upon the same underlying facts. Query, under the reasoning of the Tenth Circuit, is the one barred and the other not?

While abstract and theoretical justifications may be improvised for the distinctions now required by the decision of the Tenth Circuit, nevertheless, the logic of such a result is questionable. The facts necessary to prove the assault, battery or false arrest are virtually identical in each case; why

then a four year statute for one, and a one year statute for the other?[5]

Nor is the Tenth Circuits' concern over "voluminous" litigation solved by its approach in this case. There will now simply be litigation of stale claims, otherwise barred by the one-year statute, and continuing disputes over the applicability of the various statutes for the reasons stated above. The court has simply substituted argument over which statute is analogous to the claim asserted, for new litigation surrounding the application of statutes to stale claims where memories have faded,

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[5]Further, the decision gives a plaintiff an extra three years if the action is brought in federal court and will likely multiply federal court litigation in Utah, a result seemingly contrary to the Tenth Circuit's concern over proliferating litigation.

evidence has disappeared and witnesses are unavailable. It is, additionally, simply unfair to force policemen to defend a case such as this one, four years after the fact, when the operative events occurred at midnight in a parking lot outside a bar and those persons likely to have witnessed the incident are now unknown and unknowable.

Petitioners respectfully suggest that the decision of the Tenth Circuit is clearly at odds with the letter and the spirit of Section 1988, and the relevant decisions of this Court. The decision is also contrary to basic notions of federalism and judicial restraint, as it (1) evidences a distinct hostility to the appropriate state judgment in such matters (even though the one-year statute was not

found to be inconsistent with the Constitution and laws of the United States), and (2) evidences an inappropriate willingness to judicially legislate and impose within the State of Utah a four-year statute of limitations, contrary to established Utah law governing the precise claims asserted.[6]

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[6]Lest one read the opinions of the Tenth Circuit as inviting an amendment to the Utah statute of limitations, the language found in Garcia v. Wilson, 731 F.2d at 649 should be noted: "We are unwilling to hold that a state's articulation of the limitations period specifically applicable to Section 1983 claims is determinative of the federal issue and relieves the federal courts from characterizing a civil rights claim as a matter of federal law." Thus, the Circuit has already evidenced its hostility to any attempt by the State of Utah to amend the statute of limitations to specifically govern Section 1983 claims, or, for that matter, to amend the statute to include claims for "injury to personal rights," as such is the essence, as perceived by the Tenth Circuit, of a Section 1983 Claim.

The effect of the decision is to subject police officers to a statute of limitations four times longer than that which would apply to private individuals, solely because the lower court believes, contrary to the teachings of, for example, Board of Regents v. Tomanio, supra, that there is something unique about a Section 1983 action; in fact, the only thing unique about the instant action is that plaintiff needed to establish, in addition to the alleged assault, battery and false arrest, simply that the individual defendants were acting as agents of the Murray City Police Department, a proposition which they freely admitted.

Further, in Garcia v. Wilson, 731 F.2d at 650-651, the lower court noted that "We believe the appropriate focus

should not be on the remedy but on the elements of the cause of action, because they most fully describe the essence of the claim." Petitioners agree; that statement appears consistent with the prior decisions of the Supreme Court, and if the Tenth Circuit had in fact complied with that instruction, it would have applied the one-year statute of limitations as clearly governing the "elements of the cause of action" and the "essence of the claim."

III. THE SPLIT OF AUTHORITY NOW PRESENT IN THE FEDERAL CIRCUITS PRESENTS A TIMELY OPPORTUNITY TO REAFFIRM THE PRIOR GUIDELINES OF THIS COURT AND TO CLARIFY THE LAW.

The federal circuits disagree on the appropriate method of selecting state statutes of limitations in § 1983 cases. This disparity has spawned at least three divergent procedures:

The First, Third, Fifth, Sixth, Eleventh and D.C. Circuits examine the facts underlying the § 1983 claim and select a factually analogous state cause of action with its corresponding statute of limitations. See, Goshgai v. Leibowitz, 703 F.2d 10 (1st Cir. 1983); Aitchison v. Raffiani, 708 F.2d 96 (3rd Cir. 1983); Morrell v. City of Picayune, 690 F.2d 469 (5th Cir. 1982); Kilgore v. City of Mansfield, 679 F.2d 632 (6th Cir. 1982); McGhee v. Ogburn, 707 F.2d 1312 (11th Cir. 1983); McClam v. Barry, 697 F.2d 366 (D.C. Cir. 1983). As recently as 1983 the Tenth Circuit also used this approach. See, Clulow v. Oklahoma, 700 F.2d 1291 (10th Cir. 1983). Under this line of authority the claims in this case are untimely.

The Second, Seventh, Eighth and Ninth Circuits uniformly characterize all § 1983 cases as actions on a "liability created by statute," and select a state statute of limitations that so provides. See, Pauk v. Board of Trustees, 654 F.2d 856 (2nd Cir. 1981), cert. denied, 455 U.S. 1000 (1982); Beard v. Robinson, 563 F.2d 331, (7th Cir. 1977), cert. denied, 438 U.S. 907 (1978); Garmon v. Faust, 668 F.2d 400, (8th Cir. 1982) (en banc), cert. denied, 456 U.S. 998 (1982); Clark v. Musick, 623 F.2d 89 (9th Cir. 1980). The Tenth Circuit has also used this method. See, Spiegel v. School District No. 1, 600 F.2d 264 (10th Cir. 1979). This procedure would also arguably result in dismissal of the instant case. See, Utah Code Ann. 78-12-29(1)(3) (App. E).

The Fourth, and now the Tenth Circuits, have selected state statutes of limitation by broadly characterizing all § 1983 actions as "injuries to personal rights" or "injuries to the rights of another." Absent an express state provision addressing a specific action of this nature, these two circuits apply the state's residual statute. See Almond v. Kent, 459 F.2d 200 (4th Cir. 1972); Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984). This method alone allows the plaintiff to side-step the application of an analogous statute otherwise governing the precise claims asserted.

CONCLUSION

The petition for a writ of certiorari should be granted for the following reasons:

1. The Tenth Circuit ignored Supreme Court direction and rejected the factually precise and analogous statute of limitations for claims for assault, battery and false arrest in favor of a newly, and judicially, created characterization of § 1983 actions as a broad and ill-defined category of actions "for injuries to the rights of another"; and

2. There is a marked division among the federal circuits in decisions governing the selection of state statutes of limitation in § 1983 cases. The question should again be clarified by this Court.

Respectfully submitted this 27th day of June, 1984.

SNOW CHRISTENSEN & MARTINEAU

Paul C. Droz

Allen L. Larson

APPENDIX A

Craig K. MISMASH, Plaintiff-Appellant,

v.

MURRAY CITY, a Municipal Corporation, Scott Robinson, Gary Reid, and John Does 1 through 20, Defendants-Appellees.

No. 82-1963

United States Court of Appeals, Tenth Circuit.

March 30, 1984

Civil rights action was brought against police officers, city, and others arising from incident in which arrestee was allegedly severely beaten without cause. The United States District Court for the District of Utah, Aldon J. Anderson, Chief Judge, concluded that suit was barred by applicable statute of limitations and granted defendants' motion for summary judgment. Appeal was taken. The Court of Appeals, Seymour, Circuit Judge, held that: (1) all section 1983 claims

brought in federal court in Utah are subject to four-year limitations period, and (2) arrestee's suit brought more than one year and less than two years after incident was timely filed under applicable four-year limitations period.

Reversed and remanded.

Mary C. Corporon of Corporon & Williams, Salt Lake City, Utah, for plaintiff-appellant.

Allan L. Larson of Snow, Christensen & Martineau, Salt Lake City, Utah, for defendants-appellees.

Before SETH, Chief Judge, and HOLLOWAY, McWILLIAMS, BARRETT, DOYLE, McKAY, LOGAN and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

Craig Mismash was allegedly arrested and severely beaten without cause by Scott Robinson and Gary Reid, detectives on the Murray City Police Force. Asserting that that conduct denied him due process, Mismash brought this action under 42 U.S.C. § 1983 (1976) against Robinson, Reid, Murray City, and several unnamed police and city officials who may have authorized the acts complained

of. The district court concluded that the suit was barred by the applicable statute of limitations and granted defendants' motion for summary judgment. We reverse.

The incident giving rise to this suit occurred on September 1, 1979. Mismash filed his complaint on August 21, 1981, more than one year and less than two years later. The district court applied the one-year limitations period provided by Utah Code Ann. § 78-12-29(4) (1953), which governs "[a]n action for libel, slander, assault, battery, false imprisonment or seduction."

[1] Because Congress has not enacted a statute of limitations expressly applicable to section 1983 claims, the court must adopt the most analogous limitations period provided by state law. See 42 U.S.C. § 1988 (1976); Board of Regents v. Tomanio, 446 U.S. 478, 483-84, 100 S. Ct. 1790, 1794-95, 65 L. Ed. 2d 440 (1980). In Garcia v. Wilson, ____ F.2d _____, Nos. 83-1017, 83-1018 (10th Cir. 1984) (en banc),

decided this day, we considered the method by which an appropriate state statute is to be selected for section 1983 actions. We concluded as a matter of federal law that all section 1983 claims should be characterized as actions for injury to the rights of another. See id. at ____.

[2, 3] No Utah statute of limitations is expressly applicable to actions for injury to the rights of another. Under Utah law, personal torts other than those set forth in Utah Code Ann. § 78-12-29(4) (1953) are governed by the four year statute of limitations which applies to "[a]n action for relief not otherwise provided for by law," id. § 78-12-25(2). See, e.g., Matheson v. Pearson, 619 P.2d 321 (Utah 1980). Accordingly, we conclude that all section 1983 claims brought in federal court in Utah are subject to the four-year limitations period provided in Utah Code Ann. § 78-12-25. Under this statute, Mismash's suit was timely filed and the judgment for defendants must be reversed.

REVERSED AND REMANDED.

APPENDIX B

Gary GARCIA, Plaintiff-Appellee

v.

Richard WILSON and Martin Vigil
Defendants-Appellants.

Nos. 83-1017, 83-1018.

United States Court of Appeals
Tenth Circuit.

March 30, 1984.

Before SETH, Chief Judge, and HOLLOWAY, McWILLIAMS, BARRETT, COYLE, McKAY, LOGAN and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

Gary Garcia brought these consolidated civil rights actions under 42 U.S.C. § 1983 (1976) against former New Mexico State Police Officer Richard Wilson, and State Police Chief Martin Vigil. Garcia alleged that his constitutional rights were violated when Wilson viciously beat him on his face and body with a "slapper" and then sprayed him with tear gas. Garcia

further alleged that Vigil had improperly permitted Wilson to be hired as a State Police officer when Vigil knew or should have known that Wilson had previously been convicted of several serious crimes and when Vigil had been advised not to hire Wilson by two high ranking New Mexico State Police officers. Garcia also asserted that Vigil had been grossly negligent in failing to train, supervise, and discipline Wilson properly when he knew that Wilson had assaulted other county residents after he became a police officer.

Defendants moved to dismiss the action, asserting that the suit was barred by the statute of limitations. The district court denied the motion and certified the issue for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1976).

The only issue before us is what limitations period should be applied to this section 1983 claim. We have determined to give en banc consideration to this case in order to harmonize our decisions in this area, resolve any

inconsistencies, and establish a uniform approach to govern resolution of this question in future cases.

I.

No statute of limitations is expressly provided for civil rights claims brought under section 1983. However, Congress has specifically directed us to look to state law in civil rights cases when federal law is deficient and the state law "is not inconsistent with the Constitution and laws of the United States." See 42 U.S.C. § 1988 (1976).[1] This admonition has been interpreted to mean that

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[1]Section 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS,' and of Title "CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to

"'the controlling period would ordinarily be the most appropriate one provided by state law.'" Board of Regents v. Tomanio, 446 U.S. 478, 485 (1980) (quoting Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1975)).

The first step in selecting the applicable state statute of limitations is to characterize the essential nature of the federal action. Knoll v. Springfield Township School District, 699 F.2d 137, 140 (3d Cir. 1983); Braden v. Texas

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Fn. 1 (continued)
carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . ."

A & M University System, 636 F.2d 90, 92 (5th Cir. 1981); Burns v. Sullivan, 619 F.2d 99, 105 (1st Cir.), cert. denied, 449 U.S. 893 (1980). Characterization of such a federal claim is a matter of federal law. UAW v. Hoosier Cardinal Corp., 383 42 U.S.C. § 1988 (Supp. V 1981). U.S. 696, 706 (1966); Pauk v. Board of Trustees, 654 F.2d 856, 865-66 & n.6 (2d Cir. 1981), cert. denied, 455 U.S. 1000 (1982); Zuniga v. Amfac Foods, Inc., 580 F.2d 380, 383 (10th Cir. 1978); Williams v. Walsh, 558 F.2d 667, 672 (2d Cir. 1977). The court must then determine which state limitations period is applicable to this characterization. Braden, 636 F.2d at 92; Burns, 619 F.2d at 105. Although the federal courts are bound by the state's construction of its own statutes of limitations, it is a question of federal law whether a particular statute, as construed by the state, is applicable to a federal claim. Knoll, 699 F.2d at 141-42; Pauk, 654 F.2d at 866 n.6.

There is little dispute that these fundamental principles govern the choice

of a limitations period for civil rights claims. However, the courts vary widely in the methods by which they characterize a section 1983 action, and in the criteria by which they evaluate the applicability of a particular state statute of limitations to a particular claim. The actual process used to select an appropriate state statute varies from circuit to circuit and sometimes from panel to panel. See, e.g., Garcia v. University of Kansas, 702 F.2d 849 (10th Cir. 1983); Garmon v. Faust, 668 F.2d 400 (8th Cir.) (en banc), cert. denied, 456 U.S. 998 (1982); Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977), cert. denied, 438 U.S. 907 (1978).

Given the varied factual circumstances producing civil rights violations and the diversity of state limitations statutes, it is not surprising that no uniform approach to this problem has developed. Moreover, the Supreme Court has been singularly unhelpful in providing guidance on this important issue of federal law. The Court has instructed us to borrow "the state law

of limitations governing an analogous cause of action," Tomanio, 446 U.S. at 483-84, to "'adopt the local law of limitation,'" Runyon v. McCrary, 427 U.S. 160, 180 (1976) (quoting Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946)), and to apply "the most appropriate one provided by state law." Johnson v. Railway Express Agency, 421 U.S. at 462. Unfortunately, however, the Court has not addressed the issues that divide the circuits: what federal considerations are relevant to characterizing a civil rights claim and to determining whether a state limitations period is analogous or appropriate.

In the face of Congressional refusal to enact a uniform statute and the Supreme Court's failure to come to grips with the problem, it is imperative that we establish a consistent and uniform framework by which suitable statutes of limitations can be determined for all section 1983 claims in this circuit. In so doing, we must be mindful of the broad remedial purposes of this civil rights legislation. See Childers v. Independent School District No. 1, 676

F.2d 1338, 1342-43 (10th Cir. 1982). However, the Supreme Court has clearly stated that the policies of certainty and repose embodied in statutes of limitations are not inconsistent with the purposes of section 1983 and are therefore not to be disfavored in civil rights cases. See Tomanio, 446 U.S. at 487-89. With these considerations in mind, we begin our analysis by examining the approaches adopted by other circuits.

A. First Circuit

The First Circuit has characterized a section 1983 claim alleging the unconstitutional termination of public employment as sounding in tort, and has applied the Puerto Rican statute governing general tort suits to such a claim. See Ramirez de Arellano v. Alvarez de Choudens, 575 F.2d 315 (1st Cir. 1978); Graffels Gonzalez v. Garcia Santiago, 550 F.2d 687 (1st Cir. 1977). However, in a subsequent case in Massachusetts, the court disregarded this characterization and chose instead to apply a state statute giving public employees six

months to file an unlawful employment action in state court. The court stated that the statute was "specifically tailored to deal with the plaintiff's cause of action." Burns v. Sullivan, 619 F.2d 99, 106 (1st Cir.), cert. denied, 449 U.S. 893 (1980); see also Holden v. Commission Against Discrimination, 671 F.2d 30 (1st Cir.), cert. denied, 103 S. Ct. 97 (1982).[2]

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[2]The court in Burns reasoned that failure to apply the six-month limitations period governing discrimination claims filed under state law would allow plaintiffs to bypass the state administrative proceedings and bring their claim in federal court. 619 F.2d at 107. Subsequent to the Burns decision, the Supreme Court clearly stated that this rationale is not relevant to determining limitations periods for the separate and independent remedies provided by sections 1981 and 1983. See Board of Regents v. Tomanio, 446 U.S. 478, 489-91 (1980). The First Circuit has nonetheless continued to follow the Burns analysis. See Holden v. Commission Against Discrimination, 671 F.2d 30, 33 & n.3 (1st Cir.), cert. denied, 103 S. Ct. 97 (1982); Hussey v. Sullivan, 651 F.2d 74, 75-76 (1st Cir. 1981). To the extent that these cases are based on the ground rejected in Tomanio, they are unpersuasive.

In a recent case involving professional disciplinary proceedings in Maine, the First Circuit analogized plaintiff's section 1983 claim to various specific common law torts based on the underlying facts and the relief sought. See Gashgai v. Leibowitz, 703 F.2d 10 (1st Cir. 1983) (alleged state deprivation of reputation and ability to practice medicine most analagous to defamation and "false light" invasion of privacy). The court adopted this approach without discussion, notwithstanding its arguable inconsistency with earlier cases. Thus, in Walden, III, Inc. v. Rhode Island, 576 F.2d 945, 947 (1st Cir. 1978), the court refused to analogize the plaintiff's claim to a specific tort, remarking:

> While for purposes of deciding this case we need not rule finally on the appropriateness of ever referring to more than one statute of limitations should a precisely analogous state claim indisputably have a different limitations period, it is obviously preferable that one statute of limitations, such as that provided for torts, apply generally to most

> if not all § 1983 actions arising in a particular jurisdiction.

Id. at 947 (emphasis added).

B. Second Circuit

The Second Circuit recently affirmed its earlier decisions characterizing all section 1983 claims as actions on a liability created by statute. Pauk v. Board of Trustees, 654 F.2d 856, 866 (2d Cir. 1981), cert. denied, 455 U.S. 1000 (1982). The court refused to find section 1983 claims analogous to common law torts, stating that "[w]hile some § 1983 claims have counterparts in actions at common law, the constitutional tort remedied by § 1983 is 'significantly different from' state torts. . . ." Id. (quoting Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring)). The court also rejected application of state statutes governing suits to recover for the tortious conduct of public employees, concluding that "[i]t would be anomalous for a federal court to apply a state policy restricting

remedies against public officials to a federal statute that is designed to augment remedies against those officials, especially a federal statute that affords remedies for the protection of constitutional rights." Id. at 862. The court pointed out that applying statutes governing actions on liability created by statute to all section 1983 claims provides uniformity in approach and is consistent with the broad remedial purposes of the civil rights acts. Id. at 866.

C. Third Circuit

The Third Circuit applied "the limitation . . . which would be applicable in the courts of the state in which the federal court is sitting had an action seeking similar relief been brought under state law." Polite v. Diehl, 507 F.2d 119, 122 (3d Cir. 1974) (en banc) (applying Pennsylvania one-year statute to § 1983 claims analogous to false arrest, and two-year wrongful injury statute to claims analogous to assault and battery and coercion of guilty

plea); see also Meyers v. Pennypack Woods Home Ownership Association, 559 F.2d 894, 900 (3d Cir. 1977). The court examines "[t]he essential nature of the federal claim, including the relief sought and the type of injury alleged . . . 'within the scheme created by the various state statutes of limitations.'" Aitchison v. Roffiani, 708 F.2d 96, 101 (3d Cir. 1983) (quoting Davis v. United States Steel Supply, 581 F.2d 335, 337 (3d Cir. 1978)) (applying New Jersey Tort Claim Act two-year limitations). Thus the Third Circuit defines the federal cause of action in terms of factually similar state actions as set out in various state limitations schemes.

D. Fourth Circuit

In characterizing the nature of a section 1983 cause of action, the Fourth Circuit has stated that:

> [i]n essence, § 1983 creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate

> from or are guaranteed to the person. In the broad sense, every cause of action under § 1983 which is well-founded results from 'personal injuries.'

Almond v. Kent, 459 F.2d 200, 204 (4th Cir. 1972). Accordingly, the court in Almond applied the Virginia statute governing personal injuries to the plaintiff's claim against the sheriff and state police "not because there was a right of recovery at common law but because there was a violation of a constitutional right not to be beaten." Id. at 203-04. Citing Monroe v. Pape, 365 U.S. at 196, the court held the alleged constitutional violation to be "more important than those transitory torts for which a one-year period is prescribed." Id. at 204.

The court subsequently applied a West Virginia two-year personal injury statute rather than a five-year contract statute to a high school principal's allegation under sections 1981 and 1983 that his discharge was unconstitutional. McCausland v. Mason County

Board of Education, 649 F.2d 278 (4th Cir.), cert. denied, 454 U.S. 1098 (1981). The court pointed out that "to demonstrate the required constitutional basis for his federal complaint he must allege personal injury transcending contract rights." Id. at 279. The court also relied on the Almond analysis in rejecting a state statute expressly applicable to section 1983 actions. See Johnson v. Davis, 582 F.2d 1316, 1319 (4th Cir. 1978). Noting that the Virginia statute limiting section 1983 actions was shorter than that applicable to personal injuries, the court concluded that the special limitations period undervalued the constitutional values at stake, and unreasonably discriminated against the "constitutional tort remedy." Id.

Notwithstanding the Fourth Circuit's otherwise consistent characterization of section 1983 as creating a cause of action for injury to personal rights, the court applies the state limitations for liability created by statute to all section 1983 claims arising in North

Carolina. See Cole v. Cole, 633 F.2d 1083, 1092 (4th Cir. 1980) (constitutional claims arising out of false arrest and abuse of process); Bireline v. Seagondollar, 567 F.2d 260, 263 (4th Cir. 1977) (allegedly discriminatory employment termination of state university instructor), cert. denied, 444 U.S. 842 (1979).

E. Fifth Circuit

Two lines of cases have developed in the Fifth Circuit using different methods for selecting the most analogous state limitations period. See Shaw v. McCorkle, 537 F.2d 1289, 1292 (5th Cir. 1976). One method uses the generally accepted two-step process in which the court first characterizes the essential nature of the federal claim and then determines, according to state law, which state period would apply to a state claim similar to the federal characterization. Id. "A second line of cases formulates a more direct method of selection, asking simply which state limitations period the state itself

would have enforced had plaintiff brought an action seeking similar relief in a court of that state." Id. The court in Shaw concluded that these approaches are not inconsistent because they "in fact depend substantially on state law in catagorizing the essential nature of the claim presented. . . ." Id. at 1293. In keeping with this conclusion, the court has characterized section 1983 claims by reference to similar state law actions. See Morrell v. City of Picayune, 690 F.2d 469 (5th Cir. 1982) (assault by police officer not governed by Mississippi one-year statute because under Mississippi law such is not mere assault and battery but breach of sheriff's official duty); Lavellee v. Listi, 611 F.2d 1129 (5th Cir. 1980) (Louisiana one-year assault statute of limitations applied in § 1983 action).

Although noting its holding in Shaw that federal courts draw heavily on state law in catagorizing civil rights claims, the court nevertheless concluded in an employment termination case that

all section 1983 causes of action are essentially tortious in nature. Braden v. Texas A & M University System, 636 F.2d 90, 92 (5th Cir. 1981). The plaintiff in Braden alleged that his discharge deprived him of liberty and property interests without due process. The court refused to analogize this claim to a state law action arising out of an employment contract, concluding that "[l]iability is imposed for subjecting a person to the deprivation of rights secured by the Constitution and laws of the United States, not for breach of contract." Id. Accordingly, the court applied state limitations periods governing tort actions for injury to the person of another and actions for trespass to or conversion of property.

Although the circuit subsequently employed the analysis set out in Braden, see Jones v. Orleans Parish School Board, 688 F.2d 342 (5th Cir.) (employment termination claim under §§ 1981, 1983 held tortious in Louisiana), cert. denied, 103 S. Ct. 2420 (1982); Moore v. El Paso County, 660 F.2d 586 (5th Cir.

1981) (same in Texas), cert. denied, 103 S. Ct. 51 (1982); Rubin v. O'Koren, 644 F.2d 1023 (5th Cir. 1981) (same in Alabama), it nonetheless applied a state statute governing unwritten employment contracts to a section 1981 claim in White v. United Parcel Service, 692 F.2d 1 (5th Cir. 1982) (Mississippi). Unconstitutional employment termination is thus viewed as tortious in Texas, Alabama, and Louisiana, and contractual in Mississippi.

F. Sixth Circuit

The Sixth Circuit's approach to characterizing civil rights claims has varied according to available state statutes of limitations. In an employment discrimination suit in Michigan, the court stated that the essence of a section 1983 action is "a claim to recover damages for injury wrongfully done to the person." Madison v. Wood, 410 F.2d 564, 567 (6th Cir. 1969). The court said that "'[t]he Fourteenth Amendment protects the most fundamental personal rights and liberties guaranteed

to any citizen of the United States. When one is deprived of his civil rights, it is clear that the injury is to his person . . . .'" Id. (quoting Krum v. Sheppard, 255 F. Supp. 994, 997 (W.D. Mich. 1966)).

In subsequent employment discrimination suits, however, the court has applied state statutes governing a liability created by statute. See Mason v. Owens-Illinois, Inc., 517 F.2d 520 (6th Cir. 1975) (Ohio); Garner v. Stephens, 460 F.2d 1144 (6th Cir. 1972) (Kentucky). The court justified this result in Garner by pointing out that the state court had limited application of the personal injury limitations statute to claims involving physical injuries. Id. at 1146-47. Elsewhere the court has expressly refused to characterize section 1983 suits based on false arrest and malicious prosecution as actions on a liability created by statute, and has applied instead the limitations governing factually similar common law torts. See Kilgore v. City of Mansfield, 679 F.2d 632, 634 (6th

Cir. 1982) (Ohio); Carmicle v. Weddle, 555 F.2d 554, 555 (6th Cir. 1977) (Kentucky).

G. Seventh Circuit

Resolving a split on the issue, the Seventh Circuit held that a limitations period for section 1983 actions should not be selected by analogizing the facts underlying the claim to traditional common law torts. Beard v. Robinson, 563 F.2d 331, 336-37 (7th Cir. 1977), cert. denied, 438 U.S. 907 (1978). In Beard the court applied the Illinois limitations statute applicable to statutory causes of action, stating:

> By following the Wakat [v. Harlib, 253 F.2d 59 (7th Cir. 1958),] approach of applying a uniform statute of limitations, we avoid the often strained process of characterizing civil rights claims as common law torts, and the
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> > '[i]nconsistency and confusion [that] would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several different periods of

> limitation applicable to each state-created right were applied to the single federal cause of action.' Smith v. Cremins, [308 F.2d 187] at 190 [(9th Cir. 1962)].

Id. at 337.

Although the court indicated that one limitations period should uniformly be applied to all civil rights claims, the court has found it impossible to do so given the differing statutes of limitations in other states. See, e.g., Movement for Opportunity & Equality v. General Motors Corp., 622 F.2d 1235, 1242-43 (7th Cir. 1980) (Indiana two-year personal injury statute applied to § 1981 claim); Sacks Brothers Loan Co. v. Cunningham, 578 F.2d 172, 176 (7th Cir. 1978) (Indiana five-year statute governing actions against a public officer applied to § 1983 action against tax assessor).

H. Eighth Circuit

The Eighth Circuit also developed two inconsistent lines of cases. One line analogized civil rights cases to

similar common law torts. See, e.g., Johnson v. Dailey, 479 F.2d 86 (8th Cir. 1973) (Iowa two-year personal injury statute applied to § 1983 claim analogous to malicious prosecution action), cert. denied, 414 U.S. 1009 (1973). The other line held that such an analogy is improper because a civil rights claim is fundamentally different from a common law tort. See, e.g., Lamb v. Amalgamated Labor Life Insurance Co., 602 F.2d 155 (8th Cir. 1979) (Missouri five-year statute governing liability created by statute applied to § 1983 claim alleging conspiracy to deprive plaintiff of constitutional rights); Glasscoe v. Howell, 431 F.2d 863 (8th Cir. 1970) (Arkansas three-year statute governing liability created by statute, or five-year general statute applies to a § 1983 action against police, rather than one-year statute for assault and battery or false imprisonment).

The court addressed this inconsistency in Garmon v. Foust, 668 F.2d 400 (8th Cir. 1982) (en banc), cert. denied, 456 U.S. 998 (1982), and rejected:

> the tort analogy because it unduly cramps the significance of section 1983 as a broad, statutory remedy. Section 1983 provides a cause of action for deprivation of civil rights that in no way depends upon state common law. A litigant may pursue a section 1983 action rather than, or in addition to, state remedies.

Id. at 406. The court based its determination on its conclusion that "'a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.'" Id. (quoting Monroe v. Pape, 365 U.S. at 196 (Harlan, J., concurring)).

I. Ninth Circuit

The Ninth Circuit, in an often quoted opinion, also has concluded that common law tort analogies are not appropriate because the elements of a common law tort are not the same as the

elements establishing a cause of action under section 1983. See Smith v. Cremins, 308 F.2d 187, 190 (9th Cir. 1962) (California). In keeping with this conclusion, the Ninth Circuit almost consistently has characterized claims under sections 1981 and 1983 as actions on a liability created by statute. See, e.g., Plummer v. Western International Hotels Co., 656 F.2d 502, 506 (9th Cir. 1981) (Oregon, § 1981); Bratton v. Bethlehem Steel Corp., 649 F.2d 658, 663 (9th Cir. 1980) (California, § 1981); Clark v. Musick, 623 F.2d 89, 92 (9th Cir. 1980) (Oregon, § 1983); Tyler v. Reynolds Metals Co., 600 F.2d 232, 234 (9th Cir. 1979) (Arizona, § 1981).

The one exception to the Ninth Circuit's uniform approach is Kosikowski v. Bourne, 659 F.2d 105 (9th Cir. 1981), in which the court adopted a state limitations period expressly applicable to section 1983 claims brought in state court. The court stated that:

> [t]his precise expression of the intent of the Oregon Legislature makes unnecessary a

> resort to a characterization of appellants' cause of action in the manner employed by this court in Clark v. Musick, 623 F.2d 89 (9th Cir. 1980). Such characterization serves no purpose other than to provide guidance in the selection of the applicable state statute. When the state has expressly made that selection the federal courts should accept it unless to do so would frustrate the purposes served by the federal law upon which the plaintiff's claims rest.

Id. at 107.

J. Eleventh Circuit

The Eleventh Circuit has adopted as precedent the decisions of the Fifth Circuit handed down by that court as of September 30, 1981. See Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). Thus the Eleventh Circuit follows the Fifth Circuit's approach of characterizing civil rights claims by reference to available state statutes, drawing heavily on state law. See McGhee v. Ogburn, 707 F.2d 1312, 1315 (11th Cir. 1983).

K. D.C. Circuit

The D.C. Circuit recently addressed the disagreement among the circuits over whether state statutes governing common law torts are applicable to claims based on constitutional violations. See McClam v. Barry, 697 F.2d 366, 371-73 (D.C. Cir. 1983). The court recognized that constitutional actions may "differ from closely analogous common-law claims in the interests they protect, in their elements and origins, and in their importance." Id. at 373. However, it held that these differences are not "a ground for rejecting as not closely analogous an otherwise identical common-law cause of action." Id. The court concluded that limitations periods promote factfinding accuracy and settled expectations, and observed that:

> in determining what claim (among those for which a state limitations period is specified) is most closely analogous to a given federal claim, a court should select the claim most closely comparable to the federal claim with respect to factfinding accuracy and settled expectations. The

> comparison of any two claims will generally focus on the facts that must be litigated in trying them.

Id. at 374 (emphasis added). It then applied the one-year statute governing assault and battery to the plaintiff's constitutional claim against the defendant police officers.

The court's decision in McClam is based on its assumption that the facts establishing the elements peculiar to the constitutional cause of action are simple to prove. Id. at 374 n.7. The McClam court therefore reasoned that these elements do not render the constitutional claim so different from the comparable state cause of action that the particular state statute of limitations is inappropriate for a section 1983 action.

II.

The fundamental point of disagreement in selecting a statute of limitations for civil rights actions is whether such claims should be characterized in terms of the specific facts

generating a particular suit, or whether a more general characterization of such claims should be applied regardless of the discrete facts involved. Our past practice usually has been to characterize the section 1983 claim according to its underlying specific facts. See, e.g., Clulow v. Oklahoma, 700 F.2d 1291, 1299 (10th Cir. 1983); Shah v. Halliburton Co., 627 F.2d 1055, 1059 (10th Cir. 1980); Zuniga v. Amfac Foods, Inc., 580 F.2d 380, 383-87 (10th Cir. 1978). However, we have also variously characterized a section 1983 action alleging wrongful discharge or refusal to hire as a liability created by statute, Spiegel v. School District No. 1, 600 F.2d 264, 265-66 (10th Cir. 1979), as contractual in nature, Hansbury v. Regents of the University of California, 596 F.2d 944, 949 n.15 (10th Cir. 1979), and as a noncontractual injury to the rights of another, Garcia v. University of Kansas, 702 F.2d 849, 850-51 (10th Cir. 1983). As more fully explained below, we decide today to adopt a general characterization for all civil

rights claims based on our perception of the nature of such claims, and our conviction that this approach will ultimately best effectuate the purposes of both the civil rights acts and statutes of limitations.

We cannot accept the analysis used by the D.C. Circuit in McClam to support comparing civil rights actions to factually similar state court suits. McClam rests on two assumptions that the D.C. Circuit took to be true in the majority of cases. The court assumed first that the facts required to establish the elements of a federal claim are easy to prove, and that the federal claim therefore is not sufficiently distinct from a comparable state cause of action to warrant the application of a different statute of limitations. The court further assumed that state statutes of limitations are concerned primarily with factfinding certainty and settled expectations. While both of these assumptions may sometimes be true, they are not true sufficiently often to

justify adopting an approach that itself creates substantial problems.

To establish a claim under section 1983, a plaintiff must prove action under color of state law resulting in the deprivation of constitutional or federal rights. The court in McClam believed that whether a defendant acted in an official capacity is usually a simple factual matter. Id. at 374 n.7. Even accepting this generalization as valid, but cf. Gilmore v. Salt Lake Community Action Program, 710 F.2d 632, 635-39 (10th Cir. 1983), the facts establishing a constitutional or statutory deprivation frequently are complex and peculiarly within the knowledge of the defendant. See, e.g., Miller v. City of Mission, 705 F.2d 368 (10th Cir. 1983); Clulow v. Oklahoma, 700 F.2d 1291; Key v. Rutherford, 645 F.2d 880 (10th Cir. 1981). The plaintiff need not prove such facts to recover in a state law action. We conclude that the evidence necessary to support a section 1983 claim is so often significantly distinct from the facts at issue in an

arguably analogous state cause of action that the differences cannot be dismissed as unimportant. Accordingly, a state's determination that a state claim should be governed by a particular limitations period to ensure accuracy in the fact-finding process is not necessarily applicable to a federal claim arising out of the same incident but resting on different elements involving proof of different facts.

While we agree with the court's premise in McClam that the state's judgment in setting limitations periods is typically concerned with factfinding accuracy and settled expectations, those purposes are not the only ones motivating the enactment of such statutes. Limitations periods specifically applicable to suits against state and local officials may well be motivated by a legislative desire to limit the liability of the public entity employer in conjunction with a waiver of sovereign immunity. As the Second and Fourth Circuits have pointed out, borrowing such limitations periods is not

consistent with the remedial purpose of section 1983. See Pauk v. Board of Trustees, 654 F.2d at 862; Johnson v. Davis, 582 F.2d at 1319. Thus, unlike the Ninth Circuit in Kosikowski v. Bourne, 659 F.2d at 107, we are unwilling to hold that a state's articulation of the limitations period specifically applicable to section 1983 claims is determinative of the federal issue and relieves the federal courts from characterizing a civil rights claim as a matter of federal law.

Attempting to compare civil rights claims with particular state law actions creates other problems that are clearly revealed by our own experience and by our examination of the results of this approach in other circuits. Virtually any section 1983 claim is arguably analogous to more than one state cause of action. See, e.g., Clulow, 700 F.2d at 1299-1300; Shah, 627 F.2d at 1057-59. Thus, attempting to determine which state claim is most nearly comparable is an uncertain task with no definitive answer. In the First Circuit, for

example, a section 1983 cause of action founded on employment discrimination is tortious in Puerto Rico, see Ramirez de Arellano v. Alvarez de Choudens, 575 F.2d at 318-19, but does not sound in tort in Massachusetts simply because the state limitations scheme is different there, see Burns v. Sullivan, 619 F.2d at 105-07. The Fifth Circuit has characterized unconstitutional employment discrimination both as a tortious injury to the rights of another, see Braden v. Texas A & M University System, 636 F.2d at 93, and as an action on an unwritten contract, see White v. United Parcel Service, 692 F.2d at 2-3. As noted above, we have characterized a section 1983 employment discrimination claim three different ways in this circuit in Spiegel, Hansbury, and Garcia. This anomoly is the predictable outcome of characterizing the federal claim by deferring to the state court's treatment of a state claim seeking similar relief. Variations in state law and factual distinctions often become dispositive even though they are irrelevant

to the elements of the constitutional cause of action.

The resulting uncertainty encourages both parties to argue the state factual analogy favorable to their respective positions at every stage of the proceedings with a justifiable hope of success. Consequently, describing the federal cause of action in terms of state law claims does not promote settled expectations and repose, but instead encourages voluminous litigation that is collateral to the merits and consumes scarce judicial resources. Moreover, as pointed out above, this approach results in the unequal treatment of similar claims. Such uneven application may cause the losing party to infer that the choice of a limitations period in his case was result oriented, thereby undermining his belief that he has been dealt with fairly. This objectionable possibility is particularly undesirable in the context of socially sensitive civil rights litigation. In sum, we conclude that the arguments in favor of this approach are

not persuasive in view of its disadvantages. All of the federal values at issue in selecting a limitations period for section 1983 claims are best served by articulating one uniform characterization describing the essential nature underlying all such claims.

Those courts adopting this latter approach have characterized the fundamental nature of civil rights claims as either actions on a liability created by statute, or actions for injury to the rights of another. Compare, e.g., Pauk v. Board of Trustees, 654 F.2d at 866, with Almond v. Kent, 459 F.2d at 203-04. Although section 1983 creates a cause of action for violations of constitutional rights, it is solely a procedural statute which does not itself grant any substantive rights. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617-18 (1979). "[O]ne cannot go into court and claim a 'violation of § 1983' -- for § 1983 by itself does not protect anyone against anything." Id. at 617. The remedy provided by section 1983 is statutory in origin,

but the underlying liability it enforces stems primarily from the Constitution. It is thus analytically inaccurate to characterize section 1983 as a liability created by statute.[3] But cf. Pauk v. Board of Trustees, 654 F.2d at 861-66. We believe the appropriate focus should not be on the remedy but on the elements of the cause of action, because they most fully describe the essence of the claim.

A cause of action is established by showing the existence of a right held by the plaintiff and a breach of that right by the defendant, and is distinct from the remedy sought. Williams v. Walsh, 558 F.2d 667, 670-71 (2d Cir. 1977). The elements of a section 1983 claim are

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[3]We note moreover that not every state has a statute of limitations applicable to a liability created by statute. Where no such statute exists, a court may be forced to fall back on the very process of case-by-case characterization and analogizing that we have rejected today. See, e.g., Movement for Opportunity & Equality v. General Motors Corp., 622 F.2d at 1242-43, and the text supra at 15-16.

the deprivation of rights secured by the Constitution or federal law, and action occurring under color of state law. These rights have been described as inhering "in man as a rational being, that is, rights to which one is entitled by reason of being a person in the eyes of the law." Walden, III, Inc. v. Rhode Island, 576 F.2d 945, 946 (1st Cir. 1978) (quoting Commerce Oil Refining Corp. v. Miner, 98 R.I. 14, 199 A.2d 606 (1964)). "In the broad sense, every cause of action under § 1983 which is well-founded results from 'personal injuries.'" Almond v. Kent, 459 F.2d at 204. "[T]he cause of action is in essence delictual." Braden v. Texas A & M University System, 636 F.2d at 92. We agree with these views. Accordingly, we conclude that every section 1983 claim is in essence an action for injury to personal rights. Henceforth, all section 1983 claims in this circuit will be uniformly so characterized for statute

of limitations purposes.[4] To the extent that our prior decisions are inconsistent with the analysis we adopt today, they are hereby overruled.

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[4]The Supreme Court has addressed the issue of uniformity as a goal in determining the proper statute of limitations in civil rights cases by stating that "'in the areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will not be nationwide uniformity on these issues.'" Board of Regents v. Tomanio, 446 U.S. at 489 (quoting Robertson v. Wegmann, 436 U.S. 584, 594 n.11 (1978)) (emphasis added). We do not read this statement as contrary to our determination that uniformity in the characterization of federal civil rights claims is a commendable goal. Uniformity of characterization will not result in one limitations period being applied to all civil rights cases regardless of the state in which they arose. Rather, the limitations statutes in each state will be reviewed to determine which particular state statute is most applicable to actions for injuries to personal rights. The resulting period of limitations will thus vary from state to state, depending on state law. Within each state, however, the one most appropriate statute of limitations will be applied to all § 1983 claims brought

III.

The incident giving rise to the cause of action before us allegedly took place on April 27, 1979. Garcia filed suit on January 28, 1982, approximately two years and nine months later. Defendants contended below that the action is governed by the two-year limitations period contained in the New Mexico Tort Claims Act, N.M. Stat. Ann. § 41-4-15(A) (1978), and that Garcia's suit therefore was not timely filed. In a thorough and thoughtful opinion, the district court concluded that section 1983 claims should be uniformly characterized as actions based on a statute. Because there is no New Mexico statute governing

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Fn. 4 (continued)

within that state. Other circuits have agreed with us that the interest in attaining this limited uniformity is an important one. See Pauk v. Board of Trustees, 654 F.2d 856, 862 (2d Cir. 1981); Walden, III, Inc. v. Rhode Island, 576 F.2d 945, 947 (1st Cir. 1978); Beard v. Robinson, 563 F.2d 331, 337 (7th Cir. 1977); Smith v. Cremins, 308 F.2d 187, 190 (9th Cir. 1962).

actions on a liability created by statute, the court applied the four-year residual limitations period found in N.M. Stat. Ann. § 37-1-4 (1978).

In keeping with our holding in Part II that section 1983 claims are in essence actions to recover for injury to personal rights, we conclude that the appropriate limitations period is that found in N.M. Stat. Ann. § 37-1-8 (1978), which provides that "[a]ctions must be brought . . . for an injury to the person or reputation of any person,

within three years."[5] Accordingly, Garcia's suit was timely filed.

This case is remanded for further proceedings consistent with this opinion.

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[5]In reaching this conclusion, we note the New Mexico Supreme Court's holding in DeVargas v. New Mexico, 97 N.M. 563, 642 P.2d 166 (1982), that the limitations period provided in the New Mexico Tort Claims Act governs § 1983 suits filed against state police officers in state court. Although state courts have concurrent jurisdiction over § 1983 actions, see Martinez v. California, 444 U.S. 277, 283 n. 7, (1980), the characterization of a § 1983 claim for statute of limitation purposes is nonetheless a question of federal law, as we have noted supra at 643. Because the conclusion reached in DeVargas is at variance with our analysis in this case, we do not adopt it.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

CRAIG MISMASH, Plaintiff, v. MURRAY CITY, a Municipal Corporation SCOTT ROBINSON, GARY REID, and JOHN DOES 1 through 20, Defendants.	ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT C-81-0625A

Counsel for plaintiff Mismash filed a complaint on August 21, 1981, alleging that two officers of the Murray Police Force assaulted and beat the plaintiff in the course of the performance of their duties as members of the Murray

City Police force. Monetary and declaratory relief are sought. After answering defendants filed a motion for summary judgment on June 1, 1982, on the grounds that the complaint was not timely filed nor commenced, and is, therefore, barred under the most closely applicable state statute of limitations, Utah Code Ann. § 78-12-29(4) (1953). On June 11, 1982, plaintiff filed a motion for summary judgment, a memorandum supporting said motion and in opposition to that of defendants.

Plaintiff, however, has failed to distinguish the directly pertinent authority of this court as announced in John W. Hall v. Salt Lake City Corporation, Officer George Kearns and Officer John Dunn, C 77-0348 (March 6, 1978), (attached), wherein this court applied the one-year statute of limitations found at Utah Code Ann. § 78-12-29(4) (1953). This precedent is correct and requires the dismissal of the complaint. It follows that the issues involving the City of Murray are moot.

Accordingly,

IT IS HEREBY ORDERED that defendants' motion for summary judgment is granted.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is denied.

DATED this 12th day of July, 1982.

Aldon J. Anderson
United States District Judge

APPENDIX D

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1976)

Section 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be

> exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

42 U.S.C. § 1988 (Supp. V 1981).

APPENDIX E

1) Utah Code Annotated § 78-12-25, (1953) provides a four-year statute of limitations for
   (2) An action for relief not otherwise provided for by law.
2) Utah Code Annotated § 78-12-26, (1953) providing a three-year period for
   (4) An action for a liability created by the statutes of this state. . . .
3) Utah Code Annotated § 78-12-28, (1953) provides a two-year period for
   (1) An action against a marshal, sheriff, constable or other officer upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution; but this section shall not apply to an action for an escape.
   (2) An action to recover damages for the death of one caused by the wrongful act or neglect of another.

4) Utah Code Annotated § 78-12-29, (1953) provides a one-year statutory limitations period for the following:

(1) An action for liability created by the statutes of a foreign state.

(2) An action upon a statute for a penalty of forfeiture where the action is given to an individual, or to an individual in the state, except when the statute imposing it prescribed a different limitation.

(3) An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the state.

(4) An action for libel, slander, assault, battery, false imprisonment,* or seduction.

(5) An action against a sheriff or other officer for the escape of a prisoner arrested or in prison upon either civil or criminal processes.

(6) An action against a municipal corporation for damages or injuries to property caused by a mob or riot.

*False arrest is part of the tort of false imprisonment, and the statute of limitations applicable to the latter also applies to the former. Tolman v. K-Mart Enterprises, 560 P.2d 1127 (Utah 1977).

APPENDIX F

Officer Scott Robinson's deposition reads in part:

q. What is your occupation?
a. Police officer. (p. 5 at 4, 5)

q. Where are you presently employed?
a. Murray City Police Department. (p. 5 at 6, 7)

q. Calling your attention specifically then to September 1st, 1979, what did you do on that day?
a. I went to work at 5:00 p.m. that night, I don't recall what I did during the day. (p. 12, at 22, 23; p. 13 at 1, 2)

q. Can you describe your activities in going to work that night? What do you do when you go to work?
a. Myself and [co-defendant] Gary Reid were working vice squad that night . . . (at) approximately 10:00 p.m. we do what we call bar checks. (p. 13 at 3-10)

q. When you yelled at him [Mismash] to stop, do you remember exactly what you said to him or what you said?
a. Yeah, I just told him to stop, we were police officers, that

we wanted to talk to him. (p. 18 at 22-25)

q. And what did you do when he [Mismash] asked what the problem was?
a. The first thing I told him to do is to put his hands up on top of the hood of the car. He asked what for, I believe he asked me again, I want to see your badge. I showed him a badge . . . (p. 19 at 13-16)

Officer Gary Reid's deposition reads in part:

q. What's your occupation?
a. I am a police officer. (p. 4 at 10, 11)

q. Where are you presently employed?
a. Murray City. (p. 4 at 12, 13)

q. You were working then the night of September 1st, 1979?
a. Yes. (p. 9 at 7, 8)

q. What happened between you and Detective Robinson and the plaintiff [Mishmash]?
a. He was told he was under arrest, he asked to see some identification, Detective Robinson showed him his badge again. . . . (p. 15 at 13, 14, 19-21)

APPENDIX G

Forty-seven states and the District of Columbia have less than a four year statute of limitation for assault, battery and false arrest are. They are:

Alaska, Alas. Stat. § 09.10.070 (1983); Arizona, Ariz. Rev. Stat. Ann. § 12-542 (1982); Arkansas, Ark. Stat. Ann. § 37-201 (1962); California, Cal. Stat. Civ. Proc. Code § 340(3) (1972); Colorado Colo. Rev. Stat. § 13-80-102 (1974); Connecticut Conn. Gen. Stat. § 52-577A (1977); Delaware, Del Code Ann. Tit. 10, § 8119 (1975); District of Columbia, D.C. Code Ann. § 12-3014,8 (1981); Georgia, Ga. Code Ann. § 3-1004 (1975); Hawaii, Hawaii Rev. Stat. § 6571, 6577 (1976); Idaho, Idaho Code § 5-219(5) (1979); Illinois, Ill. Rev. Stat. Ch. 83, § 15 (1966); Indiana, Ind. Code § 34-1-2-2 (1973); Iowa, Iowa Code § 614.1(3) (1950); Kansas Kan. Stat. Ann. § 60-513(4), 60-514(2) (1983); Kentucky, Ky. Rev. Stat. § 413.140(1) (a) (1972); Louisiana, La. Civ. Code Ann. Art. 3536; Maine, Me. Rev. Stat. Ann. Title 14 § 753 (1980); Maryland, Md. Cts. Jud. Proc. Code Ann. § 5-105, (1984); Massachusetts, Mass. Gen. Law. Ann. Ch. 260, § 4 (1959); Michigan, Mich. Stat. Ann. § 27A 5805(1) (1977); Minnesota, Minn. Stat. Ann. § 541.07(1) (1947); Mississippi, Miss. Code Ann. § 15-1-35 (1972); Missouri, Mo. Ann. Stat. § 516.140 (1952); Montana Mont. Code Ann. § 27-2-207(3) (1983);

Nebraska, Neb. Rev. Stat. § 25-208, 25-207 (1979); Nevada, Nev. Rev. Stat. § 11.190(4)(c), (e) (1981); New Jersey, N.J. Rev. Stat. § 2A:14-2 (1952); New Mexico, N.M. Stat. Ann. § 37-1-8 (1978); New York, N.Y. Civ. Prac. Law § 215 McKinney (1972); North Carolina, N.C. Gen. Stat. § 1-54(3) (1983); North Dakota, N.D. Cent. Code § 28-01-18(1) (1974); Ohio, Ohio Rev. Code Ann. § 2305.11(a) (1981); Oklahoma, Okla. Stat. Ann. Tit. 12 § 95(4) (1960); Oregon, Or. Rev. Stat. § 12.110 (1983); Pennsylvania, Pa. Stat. Ann. Tit. 12 § 31.51, (1953); Rhode Island, R.I. Gen. Laws § 9-1-14 (1970); South Carolina, S.C. Code. Ann. § 15-3-550(1) (Law Coop. 1977); South Dakota, S.D. Comp. Laws Ann. § 15-2-15(1) (1969); Tennessee, Tenn. Code Ann. § 28-3-104(a) (1980); Texas, Tex. Civ. Actions Code Ann § 91-5526(6) (1958); Utah, Utah Code Ann. § 78-12-29(4) (1953); Vermont, Vt. Stat. Ann. Title § 12-512(1), (2), (4) (1973); Virginia, Va. Code § 8.01.243 (1977); Washington, Wash. Rev. Code Ann. § 4.16.100(1) (1962); West Virginia, W. Va. Code § 55-2-12(b) (1981); Wisconsin, Wis. Stat. Ann. §§ 893.54, 893.57 (1983); Wyoming, Wyo. Stat. § 1-3-105(v) (1977).

Seventeen states and the District of Columbia have statutes of limitations for assault, battery and false arrest of one year. They are:

Arkansas, Ark. Stat. Ann. § 37-201 (1962); California, Cal. Stat. Civ.

Proc. Code § 340(3) (1972); Colorado, Colo. Rev. Stat. § 13-80-102 (1974); District of Columbia, D.C. Code Ann. § 12-301(4), (8) (1981); Kansas, Kan. Stat. Ann. §§ 60-513(4), 60-514(2) (1983); Kentucky, Ky. Rev. Stat. § 413.140(1)(a) (1972); Louisiana, La. Civ. Code Ann. Art. 3492 (Supp. 1984); Maryland, Md. Cts. Jud. Proc. Code Ann. §§ 5-105, (1984); Mississippi, Miss. Ann. § 15-1-35 (1972); Nebraska, Neb. Rev. Stat. §§ 25-208, 25-207 (1979); New York, N.Y. Civ. Prac. Law § 215 McKinney (1972); North Carolina, N.C. Gen. Stat. § 1-54(3) (1983); Ohio, Ohio Rev. Code Ann. § 2305.11(a) (1981); Oklahoma, Okla. Stat. Ann. Tit. 12 § 95(4) (1960); Pennsylvania, Pa. Stat. Ann. Title 12 §§ 31, 51 (1953); Tennessee, Tenn. Code Ann. § 28-3-104(a) (1980); Utah, Utah Code Ann. § 78-12-29(4) (1953); Wyoming, Wyo. Stat. § 1- 3-105(v) (1977).

Only three states have statutes of limitation governing assault, battery and false arrest at four or more years. They are:

Alabama, Ala. Code § 6-2-34 (1977); Florida, Fla. Stat. § 95.11(3)(o) (1982); New Hampshire, N.H. Rev. Stat. Ann. § 508.4 (1983).